



June 12, 2002

Mr. Gordon Bowman  
Assistant County Attorney  
Travis County Attorney's Office  
P.O. Box 1748  
Austin, Texas 78767

OR2002-3168

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164209.

The Travis County Attorney's Office (the "county attorney") received a request for information related to the hazing investigation of the University of Texas at Austin Chapter of the Alpha Phi Alpha fraternity. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.114, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We first address your representation that some of the submitted records consist of testimony and evidence that were prepared by or for the prosecuting attorneys for presentation to the grand jury, and that were, in fact, presented to and reviewed by grand jurors. You argue that these documents are, therefore, not subject to the Public Information Act (the "Act"). The Act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). Information obtained pursuant to a grand jury subpoena issued in connection with an investigation is within the grand jury's constructive

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

possession and is not subject to the Act. *Id.* See also Gov't Code § 552.003. However, if an investigation began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the governmental body's actions in the investigation, then the information is not deemed to be in the grand jury's constructive possession. The fact that information collected or prepared by a governmental body is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the governmental body. Open Records Decision No. 513 (1988). Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the submitted information was obtained by the county attorney pursuant to a grand jury subpoena or at the direction of the grand jury, the information is in the custody of the county attorney as agent of the grand jury and is not subject to disclosure under chapter 552. *Id.* at 4. To the extent, however, that the submitted information was not obtained by the county attorney pursuant to a grand jury subpoena or at the direction of the grand jury, the information is subject to disclosure under chapter 552 and must be released unless an exception to disclosure is demonstrated to be applicable. As we are unable to determine the extent to which the submitted information is subject to chapter 552, we address your exceptions to disclosure.

You assert that a portion of the requested information is confidential under the Medical Practice Act (the "MPA"). Some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the documents to show which are medical records subject to the MPA.

You argue that the remaining submitted information is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand you to assert that the requested information pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable. Thus, the county attorney may withhold the requested information from disclosure based on section 552.108(a)(2). We note that the county attorney has the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.<sup>2</sup>

In summary, documents obtained at the direction of the grand jury or pursuant to a grand jury subpoena are not subject to the Act. Medical records may be released only as provided under the MPA. The county attorney may withhold the remaining requested information from disclosure based on section 552.108(a)(2).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

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<sup>2</sup>Because section 552.108 is dispositive, we need not address the applicability of your other claimed exceptions.

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 164209

Enc. Submitted documents

c: Mr. Derrek Millett  
3903-A Knollwood Drive  
Austin, Texas 78731  
(w/o enclosures)